EDITOR'S NOTE

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PROCEEDINGS AND ORDERS

DATE: 040

CASE NBR 85-1-06324 CSY
SHORT TITLE Watkins, Johnny
VERSUS Virginia

DOCKETED: Dec 5 198

Date	Proceedings and Orders
Oct 25 1985	Application for extension of time to file petition and order granting same until December 5, 1985 (Chief Justice, October 28, 1985).
Dec 5 1985	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Mar 12 1986	Brief of respondent Virginia in opposition filed.
Mar 13 1986	DISTRIBUTED, March 28, 1986
Mar 31 1986	The petition for a writ of certiorari is denied. Opin by Justice Stevens respecting the denial of certiorari Dissenting opinion by Justice Marshall with whom Jus Brennan joins. (Detached opinion.)

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EDITOR'S NOTE

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No. 85 - 6324 (2)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JOHNNY WATKINS, JR.,

Petitioner,

-against-

STATE OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

---

*JOHN CHARLES BOGER
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New York, New York 10013
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QUESTION PRESENTED

Did the failure of the State to provide petitioner, an indigent, with a private investigator to assist in his defense at his capital murder trial violate his Fourteenth Amendment rights?

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PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF VIRGINIA

Petitioner Johnny Watkins, Jr. respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Virginia in this case, dated June 14, 1985, is reported at 331 S.E.2d 422 (1985). The opinion is annexed as Appendix A.

JURISDICTION

The final order of the trial court in Virginia was entered on July 13, 1984. The order of the Supreme Court of Virginia affirming the conviction and death sentence was entered June 14, 1985. The Supreme Court of Virginia denied petitioner's motion for rehearing on September 6, 1985. This Court granted an extension of time for filing a petition for certiorari on October 28, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part,

> No State shall...deprive any person of life, liberty, or property without due process of law.

STATEMENT OF THE CASE

The only facts of which petitioner's counsel are aware at this time are drawn from the opinion of the Court below. The Virginia attorney who represented petitioner at the trial and on appeal claims that he mailed the record to petitioner's present counsel weeks ago, but the record has not arrived. The cost of obtaining a copy from the Virginia courts is prohibitive; copying costs are neither waived nor reduced for indigent parties. Every effort is being made to get the record from the Virginia attorney, and this petition will be supplemented with a full statement of the facts after the record has been made available to and examined by counsel herein.

From the opinion of the Supreme Court of Virginia, it appears that Johnny Watkins, Jr. was convicted of the capital murder of Carl Buchanan in the commission of a robbery while armed with a deadly weapon. He was also convicted of the

robbery itself and of using a firearm in the commission of a felony. He was sentenced to life in prison on the robbery conviction and two years on the firearms conviction. He was sentenced to death on the murder conviction. (331 S.E. 2d at 427).

Prior to his trial, petitioner moved for the appointment of a private investigator. The motion was denied. Petitioner also made a pretrial motion moved for discovery of the names and addresses of all potential witnesses for the Commonwealth. This motion too was denied. The appellate court affirmed both rulings. (331 S.E. 2d at 432).

REASONS FOR GRANTING THE WRIT

I.

PETITIONER WAS ENTITLED TO A COURT-APPOINTED PRIVATE INVESTIGATOR UNDER AKE v. OKLAHOMA

As this Court stated in Ake v. Oklahoma, 105 S. Ct. 1087 (1985),

> fundamental fairness entitles indigent defendants to "an adequate opportunity to present their claims fairly within the adversary system" . . . . To implement this principle, we have focused on identifying the "basic tools of an adequate defense or appeal," . . . . and we have required that such tools be provided to those defendants who cannot afford to pay for them.

Id. at 1094 (quoting Ross v. Moffitt, 417 U.S. 600, 612 (1974), and Britt v. North Carolina, 404 U.S. 226, 227 (1971)). The Court held that whether a "basic tool" should be provided depends on three factors: the private interest that will be affected by the action of the State, the governmental interest that will be affected if the safeguard is provided, and the value of the safeguard (along with the correlative risks in not providing it). Id. at 1094. Later in the same term, the Court left open the question whether this analysis applies to a claim of entitlement to an investigator. See Caldwell v. Mississippi, 105 S. Ct. 2633, 2637 n.1 (1985).

It is submitted here that an indigent defendant who is unable to obtain the names of witnesses -- both because the State will not provide them and because he does not have the means to find them on his own -- is at a strong disadvantage in preparing his case effectively. In a capital case, under the criteria outlined in Ake, this Court would probably find that disadvantage unacceptable. If the Court addresses the issue, it will have the opportunity to show when the Ake analysis applies and how to apply it.

CONCLUSION

The petition for certiorari should be granted.

Dated: December 5, 1985

Respectfully submitted,

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CERTIFICATION

I hereby certify that to my knowledge, the annexed Petition for Certiorari was filed by mail, by depositing it in a United States mail box, with first-class postage prepaid, addressed to the Clerk of the Court, on December 5, 1985, which is the date said Petition is due to be filed.

I further certify that a copy of the annexed Petition for Certiorari was mailed, first-class postage prepaid, to Frank S. Ferguson, Assistant Attorney General, Office of the Attorney General, Supreme Court Building, 101 North 8th Street, Richmond, Virginia 23219, on December 5, 1985. All parties required to be served have been served.

JOHN CHARLES BOGER

Sworn to before me this
5th day of December, 1985

Notary Public

APPENDIX A

presented by the defendant, his father and the psychiatrist." He also argues that, while the errors assigned "may be considered harmless when considered separately ... when compounded, the errors constitute severe and indelible impressions which lead to the sentence of death." He asks us, therefore, to hold that the sentence was imposed under the influence of passion, prejudice, or other arbitrary factors and to commute his sentence to imprisonment for life. *See* Code § 17-110.1(D)(2).

[29, 30] The trial court instructed the jury to consider all evidence adduced at the penalty trial, the written verdict expressly recited that the jurors had "considered the evidence in mitigation of the offense", and the defendant's assertion that they had not done so is merely conclusory. Moreover, since we have determined that there was no error in the conduct of the guilt trial or the finding of an aggravating battery, there is no foundation for the defendant's cumulative-effect argument. *See Waye v. Commonwealth*, 219 Va. 683, 704, 251 S.E.2d 202, 214, *cert. denied*, 442 U.S. 924, 99 S.Ct. 2850, 61 L.Ed.2d 292 (1979).

Boggs suggest nothing further to support his claim that the death penalty was the product of passion or prejudice, we find nothing of record, and we reject his complaint.

(3) *Propriety of the Sentence*

[31] In support of his contention that his sentence in the capital case was excessive or disproportionate to the penalty imposed in other cases, Boggs cites a number of our opinions which, he says, "involve circumstances which are far more shocking and cruel than the evidence in the case at bar."

That may be. But the legislature did not limit the disproportionality review to cases chosen selectively. Our comparison extends to the records in all the capital cases presented to this Court, including those in which the trial court imposed a penalty of imprisonment for life. Because we are directed by Code § 17-110.1(C)(2) to compare "similar" cases, we give special attention to those in which the underlying felony, the penalty predicate, and the facts and circumstances surrounding the commission of the crime are fairly comparable. Understandably, we have found no case identical in all particulars with Boggs' case. But, from our analysis of the cases in which the death penalty was based, as it was here, solely on the vileness predicate, *see Jones v. Commonwealth*, 228 Va. 427, 450-51, n. 3, 323 S.E.2d 554, 567 (1984) (collecting and annotating cases), and *Washington v. Commonwealth*, 228 Va. 535, 323 S.E.2d 577 (1984), we confidently conclude that "juries in this jurisdiction generally approve the supreme penalty for comparable or similar crimes." *Stamper v. Commonwealth*, 220 Va. 260, 284, 257 S.E.2d 808, 824 (1979), *cert. denied*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980).

We find no reversible error in the conduct of the defendant's trial and no reason to commute the sentence of death, and we will affirm the judgments entered below.

Affirmed.

Johnny WATKINS, Jr.

v.

COMMONWEALTH of Virginia

(Two Cases).

Record Nos. 841551, 841913.

Supreme Court of Virginia.

June 14, 1985.

Defendant was convicted in the Circuit Court of the City of Danville, James F. Ingram, J., of capital murder in the commission of robbery while armed with a deadly weapon, of robbery, and of use of a firearm in commission of a felony, and was convicted in a second case for similar

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nses, and he appealed. The Supreme
ourt, Cochran, J., held that: (1) failure to
ppoint an investigator to assist in prepara-
on of defense was not violative of defend-
t's Sixth Amendment rights; (2) use of
me jury to decide penalty after finding
efendant guilty of offense was not consti-
utionally invalid; (3) voir dire was not
adequate to insure impaneling of a fair
and impartial jury; (4) any error in admit-
ting testimony of an accomplice which was
outside scope of cross-examination was
harmless; (5) color photographs depicting
victim's face from close range were admis-
sible to prove elements of offense; (6) evi-
dence was sufficient to sustain convictions:
(i) elements of vileness and future danger-
ousness were sufficiently established in
sentencing phase to justify imposition of
death penalty; and (ii) statutory verdict
form was not unconstitutional as placing
undue emphasis on aggravating circum-
stances of future dangerousness and vile-
ness without similarly emphasizing jury's
duty to consider mitigating factors.

Affirmed.

1. Criminal Law ⇐736(2)

Admissibility of a defendant's state-
ments is an issue to be decided by the
court, which evaluates the credibility of the
witnesses, resolves any conflicts in the tes-
timony, weighs the evidence as a whole,
and then decides whether the defendant
knowingly and intelligently relinquished
and abandoned his rights. U.S.C.A. Const.
Amend. 5.

2. Criminal Law ⇐1158(4)

A trial court's determination as to the
admissibility of a defendant's statement is
a question of fact based on the totality of
the circumstances and, unless plainly
wrong, will not be disturbed on appeal.

3. Criminal Law ⇐414

Factual determination by trial court
that defendant's statement with respect to
incidents leading to murder/robbery
charges in question was voluntarily given
was supported by evidence in record indi-
cating that defendant not only understood
his rights, but could read well, and had
previously been advised of his rights twice
in unrelated matters and twice in preceding
week relative to incidents in question.

4. Constitutional Law ⇐248(2), 268.2(3)

Status of defendant as an indigent did
not give him a right under either the due
process or equal protection clauses to ap-
pointment, at public expense, of a private
investigator. U.S.C.A. Const.Amends. 5,
14.

5. Costs ⇐302.3

Advantage of having assistance of an
investigator could not be equated to rights
of indigent defendant to assistance of coun-
sel and to compulsory process for obtaining
witnesses and, hence, could not be used as
a basis for establishing a violation of Sixth
Amendment rights when an investigator
was not appointed to assist indigent de-
fendant in his defense. U.S.C.A. Const.
Amend. 6.

6. Criminal Law ⇐629

Right to discovery of names and ad-
dresses of all potential witnesses for the
Commonwealth was not a constitutional
right afforded the defendant in a criminal
case, nor was such right created by prohibi-
tion against concealing exculpatory evi-
dence. Sup.Ct.Rules, Rule 3A:11; U.S.C.A.
Const.Amend. 6.

7. Jury ⇐149

Jury, having found defendant guilty of
a capital offense, was not thereafter incap-
able of impartiality in fixing his punish-
ment and was not, therefore, subject to
being replaced by a different jury for that
purpose unless sentence set by it was later
set aside or found invalid and resentencing
was requested. Code 1950, §§ 19.2-264.3,
19.2-264.4.

8. Jury ⇐131(13)

Voir dire was not an inadequate means
to insure a fair and impartial jury, even
though some members of venire had served
on juries in other murder cases during
term, where each juror selected affirmed
that he or she could give defendant a fair

and impartial trial and base any verdict returned on law and evidence.

9. Criminal Law ⇐1158(3)

A finding by a trial court that the jury impaneled was fair and impartial is entitled to great weight and should be set aside only for plain error.

10. Jury ⇐94

A trial court does not abuse its discretion when it seats a juror whom voir dire shows to be impartial regardless of the juror's prior jury service.

11. Criminal Law ⇐134(4)

Refusal to grant a change of venue because of publicity generated by trial under indictments arising from another murder with which defendant had been charged was not an abuse of discretion in absence of evidence that newspaper articles giving rise to that publicity were inaccurate, prejudicial, inflammatory, or extensive. Code 1950, § 19.2-251.

12. Criminal Law ⇐126(1)

Trial court was fully justified in determining that it was not necessary to grant a change of venue by reason of impossibility to obtain an impartial jury since, of first 25 jurors called, only five were removed for cause, one because of relationship to defendant and four because of unalterable opposition to death penalty, and others were found to be qualified.

13. Criminal Law ⇐438(6)

Color photographs depicting from close range victim's face and bloody gunshot wound were admissible in trial court's discretion as tending to show premeditation and malice.

14. Criminal Law ⇐1170½(1)

Allowing a witness to be recalled after she had been excused from courtroom in order to testify as to whether she had seen defendant at store on prior occasions was not harmful since witness' absence from courtroom had prevented her from hearing testimony which prompted those questions and defendant had conceded his presence in store on prior occasions in any event.

15. Criminal Law ⇐1170½(1)

Failure of trial court to rule on defendant's objection to question of witness as to whether defendant was broke at time of murder/robbery in question, thereby allowing the Commonwealth to ask leading questions of witness and to comment on his testimony, was not prejudicial error inasmuch as the Commonwealth thereafter rephrased the question to eliminate its leading aspect in a manner apparently satisfactory to the defendant.

16. Witnesses ⇐387

Trial court did not abuse its discretion in ruling that the Commonwealth was entitled to cross-examine the defendant in an attempt to impeach his testimony with a prior statement and in allowing the Commonwealth to proceed over the objection that the cross-examination was argumentative.

17. Criminal Law ⇐729

Allowing the Commonwealth to misstate defendant's testimony that an accomplice had sold him the pistol was not prejudicial since the misstatement was obviously inadvertent and was promptly corrected.

18. Criminal Law ⇐1170½(1)
Witnesses ⇐288(2)

Redirect examination wherein the Commonwealth inquired of the accomplice whether he was alone in the store during the commission of the offenses, to which accomplice responded that he was not, exceeded the scope of cross-examination, which consisted of a single question as to the ownership of a pistol but any error which occurred was harmless given defendant's previous testimony in detail that accomplice was in store when he entered and when he ran out with cash drawer.

19. Criminal Law ⇐404(1)

Trial court properly ruled that rug on which victim was found was admissible as physical evidence depicting crime scene, and no error resulted from display of rug to jury, even though it was not offered in evidence.

20. Homicide ⇐235

Evidence, including testimony of an accomplice that defendant entered store with intent to commit robbery and that defendant shot victim in furtherance of that plan, was sufficient to sustain conviction of capital murder in commission of robbery while armed with a deadly weapon. Code 1950, § 18.2-31.

21. Criminal Law ⇐742(2)

The jury is the proper judge of an accomplice's credibility and the weight that should be given to his testimony.

22. Criminal Law ⇐483

Positive statement made by an expert in forensic science when testifying to effect that he was "certain" that one bullet which was removed from victim's body was fired from defendant's pistol and that there was "no margin of error" merely affected the weight of that testimony and was not such as to invalidate or even weaken that testimony in respect to results of ballistics testing.

23. Homicide ⇐18(5)

Defendant may be convicted of capital murder in the commission of a robbery without being a principal in the first degree to the crime of robbery and need only be shown to have actually committed the murder while being an accomplice to the robbery. Code 1950, § 18.2-31.

24. Homicide ⇐18(5)

Fact that defendant did not actually take cash drawer from victim, when accomplice testified that it was he who took drawer from victim on defendant's command, was insufficient to invalidate defendant's conviction of murder in commission of a robbery. Code 1950, § 18.2-31.

25. Homicide ⇐235

Evidence, including testimony of an accomplice, portions of which were confirmed by a relative of accomplice when she stated that defendant admitted to her that he killed victim, was sufficient to sustain conviction of capital murder in commission of robbery while armed with a deadly weapon. Code 1950, § 18.2-31.

26. Criminal Law ⇐1208.1(6)

In determining probability of a defendant's future criminal conduct for purpose of establishing element of future dangerousness to justify imposition of death penalty, it is essential that jury have before it all possible relevant information about individual defendant whose fate it must determine, but such information is not limited to defendant's record of convictions, and includes evidence of other crimes for which defendant has not been convicted. Code 1950, §§ 19.2-264.2, 19.2-264.4.

27. Criminal Law ⇐986.6(3)

Evidence of prior unadjudicated criminal conduct, while generally not admissible in guilt phase of capital murder trial, may be used in penalty phase to prove defendant's propensity to commit criminal acts of violence in future. Code 1950, §§ 19.2-264.2, 19.2-264.4.

28. Homicide ⇐354

Evidence of defendant's involvement in a murder for which he had yet to be tried and convicted, and commission of an earlier robbery, together with prior convictions for assault and battery and possession of a concealed weapon, was sufficient to establish element of future dangerousness required for imposition of death penalty for murder in the commission of robbery. Code 1950, §§ 19.2-264.2, 19.2-264.4.

29. Homicide ⇐354

An aggravated battery sufficient to establish element of vileness for purpose of imposing death penalty is not proven where evidence shows that victim died almost instantaneously from a single gunshot wound, but proof of infliction of multiple wounds may be sufficient to establish an aggravated battery. Code 1950, § 19.2-264.2.

30. Homicide ⇐354

Evidence that defendant fired four shots at victim, inflicting one facial and two chest wounds, and that the shots were separated by a lapse of time, was sufficient to establish aggravated battery needed to

justify imposition of death penalty on basis of vileness. Code 1950, § 19.2-264.2.

31. Criminal Law ⇐1206.1(2), 1213.2(2)

Statutes which justify imposition of death penalty upon finding vileness and future dangerousness [Code 1950, §§ 19.2-264.2, 19.2-264.4] are neither overbroad nor vague and are not unconstitutional as amounting to cruel and unusual punishment. U.S.C.A. Const.Amends. 8, 14.

32. Criminal Law ⇐1208.1(6)

Safeguards incorporated in statutory verdict form respecting imposition of death penalty, reflecting that a jury may sentence a defendant to death on finding aggravating circumstances only after having considered evidence in mitigation of offense, sufficiently satisfied constitutional requirement that jury's discretion be guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of death penalty and, hence, are not unconstitutional as placing undue emphasis on aggravating circumstances of future dangerousness and vileness without similarly emphasizing jury's duty to consider mitigating factors. Code 1950, §§ 19.2-264.2, 19.2-264.4; U.S.C.A. Const.Amends. 8, 14.

33. Criminal Law ⇐1208.1(5)

Age of defendant, 22 years, did not per se preclude imposition of death penalty, but was merely a factor to be considered by jury in weighing aggravating as well as mitigating factors. Code 1950, §§ 19.2-264.2, 19.2-264.4.

34. Constitutional Law ⇐221(1)
Jury ⇐33(1.3)

A black defendant is not constitutionally entitled to a jury during sentencing process containing members of his own race and, in order to establish a violation of equal protection, he must demonstrate purposeful or deliberate exclusion of blacks from jury service on basis of race, but such discrimination may not be assumed or merely asserted, but must be proven. U.S.C.A. Const.Amend. 14.

35. Homicide ⇐354

Sentence of death on conviction of capital murder in commission of robbery while armed with a deadly weapon was not racially motivated because defendant was black and because victim and all jurors on panel during sentencing phase were white; there was no evidence that jury selection procedures departed from random selection procedures mandated by statute, nor evidence that blacks were systematically excluded from jury, or that composition of jury resulted from racial prejudice. Code 1950, §§ 8.01-343 to 8.01-345, 19.2-260, 19.2-264.5.

36. Homicide ⇐354

Mitigating factors, such as defendant's age and criminal record, his limited education, low average intelligence, and history of episodic substance abuse, did not outweigh aggravating factors of vileness and future dangerousness, and did not, therefore, establish that death sentence on conviction of capital murder in commission of robbery while armed with a deadly weapon was imposed under influence of passion, prejudice, or other arbitrary factors. Code 1950, §§ 19.2-264.2, 19.2-264.4.

37. Homicide ⇐354

Sentences of death imposed on convictions of capital murder in the commission of robbery while armed with a deadly weapon were based on established elements of future dangerousness and vileness and were neither excessive nor disproportionate to sentences generally imposed for similar crimes throughout the Commonwealth. Code 1950, §§ 17-110.1, 19.2-264.2, 19.2-264.4.

Henry G. Crider, Danville, (E.L. Motley, Jr., Danville, on brief), for appellant in No. 841551.

James E. Kulp, Sr., Asst. Atty. Gen. (Gerald L. Baliles, Atty. Gen., on brief), for appellee in No. 841551.

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e of death on conviction of
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a deadly weapon was not
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Crider, Danville, (E.L. Motley,
on brief), for appellant in No.

ulp, Sr., Asst. Atty. Gen. (Ger
s, Atty. Gen., on brief), for
o. 841551.

E.L. Motley, Jr., Danville, (Henry G. Crider, Danville, on brief), for appellant in No. 841918.

Frank S. Ferguson, Asst. Atty. Gen. (Gerald L. Baliles, Atty. Gen., on brief), for appellee in No. 841918.

Present: All the Justices.

COCHRAN, Justice.

A jury found Johnny Watkins, Jr. (Watkins), guilty of the capital murder of Betty Jean Barker on November 14, 1983, in the commission of robbery while armed with a deadly weapon. The jury also found Watkins guilty of the robbery itself and use of a firearm in the commission of a felony and fixed his punishment for these two offenses at confinement in the penitentiary for life and for two years, respectively. In the bifurcated proceeding mandated by Code §§ 19.2-264.3 and -264.4, the jury fixed Watkins's punishment for capital murder at death, based upon findings of Watkins's future dangerousness and the vileness of the crime. After considering the probation officer's report filed pursuant to § 19.2-264.5, the trial court by final order entered July 13, 1984, sentenced Watkins in accordance with the jury verdicts.

In a subsequent trial, another jury found Watkins guilty of three offenses, the capital murder of Carl Douglas Buchanan on November 22, 1983, in the commission of robbery while armed with a deadly weapon, the robbery itself, and use of a firearm in the commission of a felony. The jury fixed his punishment for robbery and use of a firearm at confinement in the penitentiary for life and for two years, respectively. Based upon findings of Watkins's future dangerousness and the vileness of the crime, the jury fixed his punishment for capital murder at death. After considering the probation officer's report, the trial court by final order entered September 28, 1984, sentenced Watkins in accordance with the jury verdicts.

1. Watkins's convictions in each case of robbery and use of a firearm in the commission of a felony are not before us in these appeals.

In each of the capital murder cases, we have consolidated the automatic review of the death sentence with Watkins's appeal from his conviction and have given them priority on our docket. Although the two cases were briefed and argued before us independently of each other, they raised many common issues. Accordingly, we are using the format of one opinion in which to incorporate our views on all issues.[1]

I. Facts.

A. Barker Murder.

On November 13, 1983, Betty Jean Barker reported for work as clerk at a Kwik Stop convenience store about 11:00 p.m. At 2:45 a.m. on November 14, a customer departed after paying her for gasoline. About 3:15 a.m. other customers found the clerk, apparently dead, lying on the floor behind the cash register, the drawer of which was open. The life saving crew, when called to the scene, confirmed that Barker was dead. An autopsy established that she had been struck by three bullets, one in the right cheek, one in the upper right chest, and one in the upper left chest. The fatal shot, which perforated the lungs and aorta, was the one in the upper right chest. A fourth bullet, found in the victim's sweater, had not wounded her.

Quentin Nash was the principal witness for the Commonwealth. As an accomplice of Watkins, he had been convicted of the crimes but had not been sentenced. Nash testified that he and Watkins left a card game about 1:30 a.m. on November 14 in Watkins's car. Watkins said he was tired of being "broke" and was going to "rob a place," and then said he was going to the Kwik Stop market to "rob that place." Nash agreed to act as a lookout. They arrived at the Kwik Stop about 2:40 a.m., purchased gas, but then drove across the street because there were other customers in the store. At 3:00 a.m., when they saw the clerk was alone, they returned; Watkins entered the store while Nash remained

in the car. Nash, reconsidering the proposed robbery, went in to persuade Watkins not to commit the crime. Watkins, however, had purchased cigarettes. When Barker opened the cash register, Watkins shot her twice, causing her to fall to the floor. Watkins ordered Nash to take the cash register. As Nash ran from the premises with the cash drawer, he saw Watkins leaning over the counter with the firearm in his hand. When Watkins returned to the car, the men left the scene of the crimes. Nash testified that he refused to accept from Watkins any of the money obtained in the robbery. It was established that the amount of $89.89 had been taken by the robbers.

In their investigation of the Buchanan murder, the police found a .22-caliber pistol in a jacket belonging to Watkins. There was uncontradicted expert testimony that one of the bullets removed from Barker's body had been fired from this pistol.

B. Buchanan Murder.

In the early morning hours of November 22, 1983, Carl Douglas Buchanan was the sole employee working at Fast Fare, a convenience store. It was established that he was alive about 1:30 a.m. A customer who entered the store between 1:45 and 1:50 a.m. observed the cash register open and the money drawer missing. Looking behind the counter, he found Buchanan's body. The police ascertained that there was missing from the cash register the sum of $34.73, including a $2.00 bill whose serial number had been recorded. Local merchants were notified of the existence of this bill. Later on November 22, Darnell Watkins (Darnell), Watkins's brother, was identified as the person who had tendered the bill that day in paying a store account.

Obtaining a search warrant for Darnell's apartment, the police discovered that the brothers shared a bedroom. The officers found in a jacket in their bedroom credit cards, a driver's license, and other items belonging to Carl Buchanan. In another jacket bearing Watkins's employee identification badge, they found eight empty cartridges and a .22-caliber pistol loaded with six live bullets.

Darnell was the principal witness for the Commonwealth. He admitted his participation in the crimes, for which he had been convicted but not sentenced.

Darnell testified that about midnight on November 21, his brother offered to drive him to a store for cigarettes. On the way, Watkins said, "I might rob some place." After finding one store closed, they proceeded to Fast Fare, which Watkins entered while Darnell remained in the car. No other customers were in the store. Darnell saw his brother point a weapon at the clerk, saw the clerk fall backward, and saw Watkins go to the other side of the counter and take the cash drawer from the cash register. Hearing two shots, Darnell observed Watkins bending down behind the counter. When Watkins returned to the car with the cash drawer and a wallet, he drove away with his brother. Darnell asked Watkins if he had shot the clerk; Watkins replied that he had shot him three or four times in the head and chest. Watkins told Darnell the wallet contained about $40. From the proceeds of the robbery he gave Darnell $42 in repayment of a loan.

Darnell also testified that his brother later attempted to persuade him to accept responsibility for the robbery while Watkins accepted responsibility for the murder under the belief that such separation of guilty conduct would enable Watkins to avoid execution. This testimony was corroborated by a relative in whose apartment the brothers lived.

An autopsy established that Carl Buchanan had been struck by four bullets, one near the left temple, one in the left upper chest, one in the left mid-chest, and one in the right lower back. Either of the chest wounds would have been fatal. The uncontradicted expert testimony was that one of the bullets removed from Buchanan's chest had been fired from the .22-caliber pistol found in Watkins's jacket.

II. Pretrial Proceedings.

A. Barker Murder.

1. Motion to Suppress.

Watkins made a pretrial motion to suppress statements given by him to the po-

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Pretrial Proceedings

A. Barker Murder.

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Testimony at the suppression hearing
aled that both Darnell and Watkins
taken to Danville Police headquarters
ring the search of their apartment on
mber 22. About 11:00 p.m. the same
police interrogated Watkins. He was
advised of his constitutional rights as
uired by *Miranda v. Arizona*, 384 U.S.
6, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966),
after which he signed a written waiver of
his rights. During questioning, when Wat
ins stated he wanted to see a lawyer, the
terrogation terminated. An officer re
ed to writing Watkins's responses dur
g this interview, but Watkins refused to
n the statement.

About 1:00 a.m., Watkins was informed
y was being charged with capital murder.
He asked why he was being charged. Be
fore giving any explanation, an officer
again advised him of his constitutional
rights and Watkins executed a second writ
ten waiver of his rights. He was then told
that Darnell had implicated him in the mur
der and robbery of Carl Buchanan at the
Fast Fare market. When Watkins ex
pressed disbelief, police played for him a
portion of Darnell's recorded statement.
At Watkins's request, he was allowed to
see his brother, and a police officer testi
fied that Watkins asked Darnell, "Did you
really snitch on me?" According to the
officer, Darnell admitted that he had done
so. Watkins then declined to talk about
the shooting or take a polygraph test, say
ing that he wanted "to think about it."

On the morning of November 26, another
officer went to the jail to question Watkins
further. Watkins was advised of his *Mi
randa* rights a third time and signed a
third waiver form. The officer testified
that Watkins said he wanted to talk about
the incident. The officer then reduced to
writing a statement in which Watkins ad
mitted having shot Buchanan with a pistol
he had purchased in 1983 but claimed he
shot in self-defense. He signed each page
of this statement. The officer said Wat
kins was cooperative and showed no hesi
tation in making the statement. The offi
cer made no promises or representations to
Watkins to induce the statement, and Wat
kins never indicated he wanted to stop the
questioning or consult with a lawyer. The
meeting lasted about 15 minutes.

Watkins testified that he did not simply
start telling what he knew at this third
interview. Instead, he said he asked for an
attorney but the officer ignored his re
quest. He also said the officer informed
him it would be better if he told the truth
because Darnell had already revealed to
the police what happened. Watkins con
ceded he signed the waiver which contained
the statement, "I do not want a lawyer at
this time." He said he continued to answer
the officer's questions "to be polite" and
because the officer kept "nagging" him.

The trial court held that Watkins's state
ments were given freely, voluntarily, and
intelligently, without coercion, threat, or
promise, and after he was properly advised
of his rights. The November 26 statement
about the Buchanan killing was then of
fered and admitted only in the penalty
phase of Watkins's trial for the Barker
murder. Defendant argues that this state
ment was not voluntary because he was
entitled to stop the questioning at any time
but the officer's persistence resulted in his
being denied this right.

[1, 2] Admissibility of a defendant's
statements is an issue to be decided by the
court, which evaluates the credibility of the
witnesses, resolves any conflicts in the tes
timony, and weighs the evidence as a
whole. *Stockton v. Commonwealth*, 227
Va. 124, 140, 314 S.E.2d 371, 381, *cert.
denied*, 469 U.S. —, 105 S.Ct. 229, 83
L.Ed.2d 156 (1984); *Witt v. Common
wealth*, 215 Va. 670, 674, 212 S.E.2d 293,
297 (1975). The court must decide whether
the defendant knowingly and intelligently
relinquished and abandoned his rights.
Wyrick v. Fields, 459 U.S. 42, 47, 103 S.Ct.
394, 396, 74 L.Ed.2d 214 (1982); *Wash
ington v. Commonwealth*, 228 Va. 535,
547–48, 323 S.E.2d 577, 586 (1984), *cert.
denied*, 471 U.S. —, 105 S.Ct. 2347, —
L.Ed.2d — (1985); *Bunch v. Common
wealth*, 225 Va. 423, 433, 304 S.E.2d 271,
276, *cert. denied*, 464 U.S. 977, 104 S.Ct.

414, 78 L.Ed.2d 352 (1983). The court's determination is a question of fact based on the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973); *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938); *Jones v. Commonwealth*, 228 Va. 427, 441, 323 S.E.2d 554, 561 (1984); *Washington*, 228 Va. at 547–48, 323 S.E.2d at 586; *Bunch*, 225 Va. at 433, 304 S.E.2d at 276. This factual finding will not be disturbed on appeal unless plainly wrong. *Jones*, 228 Va. at 441, 323 S.E.2d at 561; *Stockton*, 227 Va. at 140, 314 S.E.2d at 381.

[3] The trial court was in a position to evaluate the credibility of the witnesses in accepting the testimony of the officer and rejecting the conflicting testimony of Watkins on the waiver question. The waiver signed by Watkins indicates he did not seek counsel. Watkins himself testified that he understood his rights, that he could read well, and that he had previously been advised of his rights twice in unrelated matters and twice in the preceding week relative to the Barker and Buchanan murders. He admitted he knew he did not have to give a statement without a lawyer present but voluntarily gave the statement when he realized the officer would keep "nagging" him. We hold that the evidence in the record is sufficient to justify the factual determination by the trial court that Watkins's statement was voluntarily given. *See Bunch*, 225 Va. at 434, 304 S.E.2d at 277; *Clark v. Commonwealth*, 220 Va. 201, 208–09, 257 S.E.2d 784, 788–89 (1979), *cert. denied*, 444 U.S. 1049, 100 S.Ct. 741, 62 L.Ed.2d 736 (1980).

2. Other Pretrial Motions.

[4] Watkins asked the court to appoint an investigator to assist in the preparation of his defense. The trial court denied the motion. We affirm this ruling. We have held that an indigent defendant has no constitutional right under the Due Process or Equal Protection clauses to appointment, at public expense, of a private investigator. *See Stockton*, 227 Va. at 140–41, 314 S.E.2d at 382; *Quintana v. Commonwealth*, 224 Va. 127, 135, 295 S.E.2d 643, 646 (1982), *cert. denied*, 460 U.S. 1029, 103 S.Ct. 1280, 75 L.Ed.2d 501 (1983); *Morton v. Commonwealth*, 221 Va. 436, 446, 271 S.E.2d 123, 130 (1980).

[5] Watkins contends, however, that failure to appoint an investigator to assist in his defense violated his Sixth Amendment rights. Citing no authority, he equates the advantage of having the assistance of an investigator to the right to compulsory process for obtaining witnesses and the right to assistance of counsel expressly guaranteed by the Sixth Amendment. The Sixth Amendment does not mandate appointment of an investigator, however, and we will not infer such a requirement from the clear language of the Amendment which outlines the constitutional prerequisites for criminal prosecutions. As the Supreme Court has stated in another context, "the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required." *Ross v. Moffitt*, 417 U.S. 600, 616, 94 S.Ct. 2437, 2447, 41 L.Ed.2d 341 (1974).

Watkins also moved for discovery of the names and addresses of all potential witnesses for the Commonwealth. The motion was denied. Although Watkins conceded in pretrial argument on the motion that there is no existing authority requiring the Commonwealth to provide this information, he contends that failure to allow such discovery violates the Sixth Amendment. He based his pretrial argument on the right to assistance of counsel; on appeal, he argued denial of the right to be confronted with the witnesses against him.

[6] There is no constitutional right to discovery in a criminal case. *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 845, 51 L.Ed.2d 30 (1977). Nor does the prohibition of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), against concealing exculpatory evidence create a constitutional requirement that the prosecution furnish the names of its wit-

...d at 382; *Quintana v. Com.*, 224 Va. 127, 135, 295 S.E.2d ..., *cert. denied*, 460 U.S. 1095, ... 0, 75 L.Ed.2d 501 (1983); *Mar... monwealth*, 221 Va. 436, 448, ... 3, 180 (1980).

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...ases before trial. *Weatherford*, 429 U.S. ... 559, 97 S.Ct. at 845; *see Lowe v. Com...monwealth*, 218 Va. 670, 679, 239 S.E.2d ...12, 118 (1977), *cert. denied*, 435 U.S. 930, ...S.Ct. 1502, 55 L.Ed.2d 526 (1978) (Rule ...A:11, formerly Rule 3A:14, providing for ...covery in criminal cases, does not re...uire Commonwealth to provide names and ...addresses of witnesses). The trial court properly denied the discovery motion.

On the morning of trial, Watkins argued ...wo motions relating to the selection of the ...jury. First, he sought to have separate ...juries impaneled for the guilt and sentenc...ing phases. Second, he requested a new ...jury panel because the panel from which ...the jury would be drawn to hear the case ...had previously provided juries in two un...related murder cases during the term. The ...court properly denied both motions.

[7] Virginia's capital murder statute ex...pressly provides that the same jury shall ...decide the penalty after finding a defend...ant guilty of an offense punishable by ...death; a different jury is impaneled only if ...the sentence of death is later set aside or ...found invalid and resentencing is request...ed. Code § 19.2-264.3. Watkins contends ...that once a jury finds a man guilty of a ...capital offense, it is incapable of impartiali...ty in fixing his punishment. This argu...ment is untenable, however, in light of the ...sentencing statute, which has repeatedly ...withstood constitutional scrutiny. *See La...Vasseur v. Commonwealth*, 225 Va. 564, ...592-93, 304 S.E.2d 644, 659 (1983), *cert. denied*, 464 U.S. 1063, 104 S.Ct. 744, 79 ...L.Ed.2d 202 (1984); *Clark*, 220 Va. at 212-...13, 257 S.E.2d at 791-92; *Smith v. Com...monwealth*, 219 Va. 455, 476-78, 248 ...S.E.2d 135, 148-49 (1978), *cert. denied*, 441 ...U.S. 967, 99 S.Ct. 2419, 60 L.Ed.2d 1074 ...(1979).

Under § 19.2-264.4, the sentencing jury must consider, among other things, "the circumstances surrounding the offense." It is the jury's duty to consider all the evidence, both favorable and unfavorable, before fixing punishment. *Stamper v. Commonwealth*, 220 Va. 260, 275-76, 257 S.E.2d 808, 819 (1979), *cert. denied*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980). Thus, even under the two-jury system Watkins seeks, the sentencing jury would necessarily have access to the evidence presented in the guilt phase of the trial. Such a system would give no greater assurance of impartiality than the system now used but it would needlessly require two separate trials in which the same evidence would be presented. This kind of cumbersome procedure is not mandated by the United States or Virginia constitutions. *See Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (upholding constitutionality of Texas and Georgia statutes which provide for bifurcated proceedings before the same jury on the issues of guilt and penalty).

[8] Watkins next contends that voir dire was not an adequate means to insure a fair and impartial jury where some of the members of the venire had served on juries in other murder cases during the term. Voir dire examination revealed that 15 of the 20 jurors who qualified had previously served on juries, and several had served in a capital murder trial during the same term. Nevertheless, each juror affirmed that he or she could give Watkins a fair and impartial trial and base any verdict returned on the law and the evidence.

[9, 10] The partiality or impartiality of an individual juror is a factual issue best determined by the trial court. *Patton v. Yount*, 467 U.S. ——, ——, 104 S.Ct. 2885, 2893, 81 L.Ed.2d 847 (1984). The court's finding that the jury impaneled was fair and impartial is entitled to great weight and should be set aside only for plain error. *See Hevener v. Commonwealth*, 189 Va. 802, 811, 54 S.E.2d 893, 898 (1949); *Slade v. Commonwealth*, 155 Va. 1099, 1106, 156 S.E. 388, 391 (1931). The court does not abuse its discretion when it seats a juror whom voir dire shows to be impartial, regardless of the juror's prior jury service. *Slade*, 155 Va. at 1106, 156 S.E. at 391 (jurors not incompetent to try related cases involving different issues and law in the same term); *Burford v. Commonwealth*, 132 Va. 512, 516, 110 S.E. 428, 429 (1922) (jurors not disqualified because previously convicted same defendant of different offense). Since voir dire revealed no bias or prejudice among the jurors, including those who had heard other cases, the court did not abuse its discretion in qualifying each individual juror and in refusing Watkins's motion to summon an entirely new panel.

B. Buchanan Murder.

1. Motion to Suppress

Watkins made a pretrial motion to suppress statements given by him to the police. We have affirmed the ruling of the trial court in the appeal of his Barker murder conviction that the statements were freely, voluntarily, and intelligently given, without coercion, threat, or promise, after Watkins was properly advised of his rights. The same rationale applies in this case. Moreover, the statements were never offered in evidence in either the guilt or penalty phases of the trial.

2. Other Pretrial Motions.

Watkins moved the court for appointment of a private investigator at public expense to assist in his defense. The motion was denied. For reasons stated in the appeal of the Barker murder conviction, we affirm the ruling. *See Martin*, 221 Va. at 446, 271 S.E.2d at 130.

The trial court denied Watkins's motion for discovery of the names and addresses of all potential witnesses for the Commonwealth. For reasons stated in the appeal of the Barker murder conviction, we affirm the ruling. *See Lowe*, 218 Va. at 679, 239 S.E.2d at 118; Rule 3A:11.

[11] Watkins moved for a change of venue pursuant to Code § 19.2-251 because of publicity generated by the trial of Watkins under the indictments arising from the Barker murder. Attached to the motion were five articles which had been published in the local newspapers. The trial court, in denying the motion, found that the articles were not inaccurate, prejudicial, inflammatory, or extensive. We affirm the ruling. Where a defendant relied on 70 articles in newspapers to support his motion for change of venue but did not allege that the articles were either inaccurate or intemperate, we affirmed the trial court's denial of the motion. *Linwood Earl Briley v. Commonwealth*, 221 Va. 532, 537, 273 S.E.2d 48, 51 (1980), *cert. denied*, 451 U.S. 1031, 101 S.Ct. 3022, 69 L.Ed.2d 400 (1981).

A motion for a change of venue is addressed to the discretion of the trial judge. Absent an affirmative showing that there has been an abuse of discretion, we will not disturb the decision. *Tuggle v. Commonwealth*, 225 Va. 498, 508, 328 S.E.2d 539, 545 (1984), *vacated and remanded*, 471 U.S. ——, 105 S.Ct. 2315, — L.Ed.2d —— (1985); *Washington*, 228 Va. at 544, 323 S.E.2d at 584; *Newcomer v. Commonwealth*, 220 Va. 64, 67, 255 S.E.2d 485, 487 (1979). There has been no such showing in this case.

[12] The trial court experienced no difficulty in impaneling an impartial and qualified jury. Prospective jurors were extensively questioned by the court and by counsel on voir dire. Of the first 25 called, only five were removed for cause, one because of relationship to the defendant and four because of unalterable opposition to the death penalty, under *Witherspoon v. Illinois*, 391 U.S. 510, 522, 88 S.Ct. 1770, 1777, 20 L.Ed.2d 776 (1968). The others were found to be qualified. We hold that the trial court was fully justified in deciding that it was not necessary to grant a change of venue in order to accord Watkins a fair trial.

III. The Guilt Trial.

A. Barker Murder.

1. Admissibility of Photograph.

Watkins challenges the admission of a color photograph which depicted from close range the victim's face and a bloody gunshot wound. He asserts this photograph was unnecessary, immaterial, and inflammatory. The court held the photograph was admissible to prove the elements of the offense charged because it showed one of

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, 221 Va. 532, 537, 273 S.E.2d
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decision. *Tuggle v. Common*
Va. 493, 503, 323 S.E.2d 539,
vacated and remanded, 471
05 S.Ct. 2315, — L.Ed.2d —
shington, 228 Va. at 544, 323
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[13] We have held repeatedly that admission of photographs is within the trial court's discretion, and the court's ruling will be disturbed only upon a showing of clear abuse of discretion. *See Poyner v. Commonwealth*, 229 Va. —, —, 329 S.E.2d 815, 827 (1985); *Jones*, 228 Va. at —, 323 S.E.2d at 566–67; *Washington*, 228 Va. at 552, 323 S.E.2d at 588; *Stockton*, 227 Va. at 144, 314 S.E.2d at 384; *Bunch*, 225 Va. at 436–37, 304 S.E.2d at 278; *Peterson v. Commonwealth*, 225 Va. 289, 294, 302 S.E.2d 529, 524, *cert. denied*, 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 176 (1983); *Martin*, 221 Va. at 447, 271 S.E.2d at 130. Having reviewed the photograph at issue, we find no abuse of discretion in its admission. The photograph tended to show premeditation and malice. *See Stockton*, 227 Va. at 144, 314 S.E.2d at 384.

2. Admissibility of Other Evidence.

Ellen Boaz, an employee of Kwik Stop, testified early in the trial. After she was excused, she sat in the courtroom and heard the testimony of other witnesses. The Commonwealth interrupted its questioning of the Kwik Stop manager to have Boaz excused from the courtroom so she later could be recalled. The Commonwealth then elicited from the manager that he had previously seen Watkins at the market. The Commonwealth recalled Boaz to ask if she had seen Watkins at the store on prior occasions. Watkins, objecting to the recall of Boaz, offered to stipulate that he had been in the Kwik Stop before November 13. Nevertheless, the court permitted the question to be asked, and Boaz answered in the affirmative.

[14] Watkins argues the court erred in allowing Boaz's recall. We agree with the court's ruling that no harm resulted from recalling the witness since she had not heard testimony relevant to the question later asked of her and since Watkins conceded his presence at Kwik Stop at times prior to these offenses.

On direct examination of Kenny Fitzgerald, a participant in the November 13 card game, the Commonwealth elicited testimony that Fitzgerald gave Watkins $10 at Watkins's request. The Commonwealth's attorney then asked, "So he was broke?" Fitzgerald responded, "Yeah." Watkins objected to this question, but before the court ruled the Commonwealth's attorney said, "Well, I'll ask him ... do you know whether or not he had any money?" No additional objection was made, and Fitzgerald answered, "Well, I don't think he would have asked me for none, if he would have had some."

[15] Watkins contends that the court erred in not ruling on his objection, thereby allowing the Commonwealth to ask leading questions of Fitzgerald and to comment on his testimony. We find no prejudicial error since the Commonwealth rephrased the question to eliminate its leading aspect in a manner apparently satisfactory to Watkins. Moreover, Nash subsequently testified that Watkins was "broke."

[16] During cross-examination of Watkins, who testified in his own behalf, the Commonwealth attempted to impeach his testimony with a prior statement. Watkins objected to the questioning, which he alleged was argumentative, and asserted that the Commonwealth's attorney was "yelling" at him. The court ruled that the Commonwealth was entitled to cross-examine Watkins on this aspect of his testimony and allowed the questioning to proceed. The conduct of the trial is committed to the discretion of the trial court. *Justus v. Commonwealth*, 222 Va. 667, 676, 283 S.E.2d 905, 910 (1981), *cert. denied*, 455 U.S. 982, 102 S.Ct. 1491, 71 L.Ed.2d 693 (1982). Perceiving from the record no abuse of discretion, we will not disturb the court's ruling.

[17] Watkins also argues that the court erred in allowing the Commonwealth's attorney to misstate his testimony that Nash had sold him the pistol. Following a defense objection to a question which began, "if you sold Quentin Nash that gun on the

17th," the Commonwealth's attorney rephrased his question and asked, "if Nash sold you the gun, did he sell you the empty cartridges, too?" The prosecutor's misstatement in the first question was obviously inadvertent and was promptly corrected, without prejudice to Watkins, by the question which followed.

[18] On redirect examination of Nash, the Commonwealth was permitted to ask him if he was alone in the store during the commission of the offenses, to which Nash responded that he was not. Watkins contends this question exceeded the scope of cross-examination, which consisted of a single question as to the ownership of the pistol. While the question was outside the scope of cross-examination, any error in the admission of Nash's answer was harmless. Nash had previously testified in detail that Watkins was in the store when he entered and when he ran out with the cash drawer.

Watkins also argues the trial court improperly allowed the Commonwealth to question Nash about a statement Watkins allegedly made that he had robbed before. This evidence, however, was not presented until the sentencing phase of the trial, when it was admitted without objection.

3. Display of Bloody Rug.

Watkins objected to admission of the sweater the victim was wearing and the rug on which she was found. He argued that because both articles were bloody, the prejudice to Watkins would outweigh their probative value. The court ruled that both the sweater and the rug were admissible as physical evidence found at the crime scene. The rug was then displayed to the jury along with other items of physical evidence. When the Commonwealth introduced the physical evidence, however, the rug was not offered, but Watkins continued his objection because it had been displayed.

[19] On issues involving the admissibility of evidence, much must be left to the court's discretion. *See Stamper*, 220 Va. at 269–71, 257 S.E.2d at 815. Because the court properly ruled the rug admissible physical evidence depicting the crime scene, we hold that no error resulted from its display to the jury even though it was not offered in evidence.

4. Sufficiency of Evidence.

[20, 21] Watkins challenges the sufficiency of the evidence to establish his guilt of the Barker murder. He argues that the evidence, based in large part on an accomplice's testimony, created only a suspicion of guilt. We disagree. The evidence was amply sufficient to create a jury issue. The testimony of Nash, the accomplice, was that Watkins entered the store with the intent to commit robbery and that he shot Barker in furtherance of that plan. The jury was the proper judge of Nash's credibility and the weight that should be given his testimony. *Johnson v. Commonwealth*, 224 Va. 525, 528, 298 S.E.2d 99, 101 (1982); *Coppola v. Commonwealth*, 220 Va. 243, 252, 257 S.E.2d 797, 803 (1979), *cert. denied*, 444 U.S. 1103, 100 S.Ct. 1069, 62 L.Ed.2d 788 (1980). The court instructed the jury that it should use caution in basing a conviction on the uncorroborated testimony of the accomplice. *See Johnson*, 224 Va. at 527–28, 298 S.E.2d at 101.

[22] Watkins also says the testimony of William E. Conrad, an expert in forensic science, was patently incredible so as to preclude submission of the case to the jury. Conrad stated that he was certain one of the bullets removed from the victim's body was fired from Watkins's pistol; he said there was "no margin of error." This positive statement merely affects the weight of his testimony; it does not necessarily invalidate or even weaken the results of his ballistics testing.

[23, 24] Finally, Watkins says he could not be convicted of murder in the commission of a robbery because he did not actually take the cash drawer. Rather, Nash testified that he took the drawer on Watkins's command. Under § 18.2-31, however, a defendant may be convicted of capital murder in the commission of a robbery without being a principal in the first degree

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den. The court properly overruled Wat-
kins's motion to strike the evidence, sub-
mitted the case to the jury, and overruled
Watkins's motion to set aside the verdict.

B. Buchanan Murder.

Sufficiency of Evidence.

[25] Watkins raises similar arguments to challenge the sufficiency of the evidence to sustain his conviction for the murder of Buchanan. He argues the testimony of Darnell, an accomplice in the commission of the offenses, was suspect. As in the trial on the Barker offenses, the court gave the jury a cautionary instruction about relying on an accomplice's uncorroborated testimony. Darnell's testimony, if believed, was sufficient to convict. Additionally, Watkins's aunt confirmed portions of Darnell's testimony, stating that Watkins admitted to her that he killed Buchanan.

Watkins also challenges the credibility of Conrad, who again testified that he had no doubt that one of the bullets recovered from the victim's body was fired from Watkins's gun and that there was no possibility of mistake in his analysis. For reasons stated in the appeal of the Barker murder conviction, we hold the court properly submitted this case to the jury and properly refused to set aside the verdict.

Watkins reiterates his previous argument that he could not be convicted of murder in the commission of a robbery where he did not perpetrate the act of taking. This argument is not only meritless, for reasons stated in the appeal of the Barker murder conviction, but is inapplicable in the Buchanan case, as the Commonwealth's evidence showed that it was Watkins who actually removed the cash drawer and took Buchanan's wallet.

IV. The Penalty Trial.

A. Barker Murder.

1. Admissibility of Evidence of Buchanan Murder and Sufficiency of Evidence of Dangerousness.

During the sentencing phase of the Barker murder trial, the Commonwealth introduced detailed evidence of the Buchanan murder, for which Watkins had yet to be tried and convicted. The evidence included testimony of the Fast Fare manager, the medical examiner, the forensic scientist, and four law enforcement officers, all of whom later testified in Watkins's trial for the Buchanan murder. The Commonwealth introduced Watkins's statement of November 28 and photographs of the store and the second victim's body. Moreover Nash testified without objection that, as he and Watkins proceeded to the Kwik Stop, Watkins assured him that there was "nothing to" the proposed robbery, that Watkins with others had committed robbery before. There was no evidence that Watkins had been charged or convicted of an earlier robbery.

Watkins contends that admission of evidence of the second murder in the first trial violated his presumption of innocence of the second offense; he says he was, in effect, tried and convicted of the Buchanan murder in the sentencing phase of the Barker murder trial. He also argues that use of evidence of unadjudicated criminal activity is restricted by statute. *See* Code § 19.2-264.2.

[26] Code § 19.2-264.2 provides that a jury may impose a sentence of death upon finding that the defendant poses a continuing serious threat to society after considering his prior "criminal record of convictions." Under Code § 19.2-264.4, however, the Commonwealth is expressly authorized to introduce "evidence of the prior history of the defendant" to establish his future dangerousness. In *LeVasseur*, we resolved any conflict in the statutory terminology and held that the difference in the language of the two provisions did not render the capital-murder sentencing scheme unconstitutionally vague. 225 Va. at 593–94, 304 S.E.2d at 660. We noted that, in determining the probability of a defendant's future criminal conduct, it is "essential ... that the jury have before it *all possible relevant information* about the individual defendant whose fate it must determine." *Id.* at 594, 304 S.E.2d at 660, quoting *Jurek v. Texas*, 428 U.S. 262, 275–76, 96 S.Ct. 2950, 2957–58, 49 L.Ed.2d 929 (1976) (emphasis added in *LeVasseur*).

Admissible evidence in the sentencing phase is not limited to the defendant's record of convictions. *Peterson*, 225 Va. at 298, 302 S.E.2d at 526. We have repeatedly approved the use of testimonial evidence relating to a defendant's commission of other crimes of which he has been convicted. *See Coleman v. Commonwealth*, 226 Va. 31, 43–44, 307 S.E.2d 864, 870–71 (1983), *cert. denied*, 465 U.S. ——, 104 S.Ct. 1617, 80 L.Ed.2d 145 (1984); *Peterson*, 225 Va. at 298, 302 S.E.2d at 526; *Quintana*, 224 Va. at 147–48, 295 S.E.2d at 653–54; *Stamper*, 220 Va. at 275–77, 257 S.E.2d at 819–20. In *Stamper* we said, "In determining his proclivity for violence, the jury may obtain from the mere record of previous convictions an inaccurate or incomplete impression of the defendant's temperament and disposition." 220 Va. at 276, 257 S.E.2d at 819.

We have also held to be admissible in the sentencing phase evidence of other crimes for which a defendant has not been convicted. *See Poyner*, 229 Va. at ——, 329 S.E.2d at 827; *Stockton*, 227 Va. at 147, 314 S.E.2d at 365. In *Poyner*, the Commonwealth was permitted to introduce the defendant's video-taped confession to five murders in the sentencing phases of three capital-murder trials (Williamsburg and Newport News cases), although he had not yet been tried and convicted of all five offenses. 229 Va. at ——, ——, 329 S.E.2d at 827, 837. The confession was deemed "highly reliable and wholly relevant to the issue of future dangerousness." 229 Va. at ——, 329 S.E.2d at 828. The Commonwealth also was permitted to introduce the testimony of the victim of assault and battery, although there was no evidence that Poyner was tried or convicted of the offense which she described. 229 Va. at ——, 329 S.E.2d at 827.

In *Stockton*, a witness had testified to Stockton's murder of a second victim. That evidence, admissible in the guilt phase because the two offenses were interrelated and because the second murder demonstrated Stockton's guilty knowledge of the first and his attempt to conceal his guilt, we also deemed relevant to establish the defendant's propensity for future crimes of violence. 227 Va. at 143, 147, 314 S.E.2d at 363, 365.

[27, 28] Adhering to these rulings, we hold that evidence of prior unadjudicated criminal conduct, while generally not admissible in the guilt phase of a capital-murder trial, may be used in the penalty phase to prove the defendant's propensity to commit criminal acts of violence in the future. *See Clines v. State*, 280 Ark. 77, 91–92, 656 S.W.2d 684, 690 (1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 1328, 79 L.Ed.2d 723 (1984); *State v. Rault*, 445 So.2d 1203, 1214–15 (La.), *cert. denied*, —— U.S. ——, 105 S.Ct. 225, 83 L.Ed.2d 154 (1984); *Williams v. State*, 668 S.W.2d 692, 694 (Tex. Crim.App.1983) (evidence of unadjudicated criminal activity admitted in sentencing phase of capital-murder proceedings). Here, in his statement introduced in evidence, Watkins claimed he shot Buchanan, an unarmed man who he thought was reaching for a weapon, four times in self-defense. The jury could find this explanation incredible. The evidence of Watkins's involvement in the Buchanan murder and commission of an earlier robbery, together with his prior convictions for assault and battery and possession of a concealed weapon, was sufficient to support a jury finding of his future dangerousness.

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2. Sufficiency of Evidence of Vileness.

Watkins argues that the evidence was insufficient to establish vileness and the court therefore erred in instructing the jury on this aggravating circumstance. Even if the evidence were insufficient to sustain a finding of vileness, the imposition of the death sentence in this case would nonetheless be proper because the jury found, on sufficient evidence, that Watkins is likely to constitute a continuing serious threat to society. *Zant v. Stephens*, 462 U.S. 862, 881, 103 S.Ct. 2733, 2745, 77 L.Ed.2d 235 (1983). We hold, however, that the evidence was sufficient to establish vileness.

So far as is pertinent here, Code § 19.2-264.2 authorizes imposition of a death sentence if the jury finds that the defendant's conduct "was outrageously or wantonly vile, horrible or inhuman in that it involved ... an aggravated battery." The court's instruction permitted the jury to find that Watkins's conduct constituted vileness in that it involved an aggravated battery. The question is whether there was sufficient evidence to support the instruction and the jury's finding of an aggravated battery, defined as one "which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder." *Smith*, 219 Va. at 478, 248 S.E.2d at 149; *see also Edmonds v. Commonwealth*, 229 Va. —, —, 329 S.E.2d 807, 814 (1985); *Turner v. Commonwealth*, 221 Va. 513, 527, 273 S.E.2d 36, 45 (1980), *cert. denied*, 451 U.S. 1011, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981); *Clark*, 220 Va. at 211, 257 S.E.2d at 790.

The evidence established that Watkins fired four shots at Barker, inflicting one facial and two chest wounds. He first fired two shots across the store counter and she fell to the floor. After Nash fled with the cash drawer, Watkins leaned across the counter and fired two more shots.

[29, 30] An aggravated battery is not proven where the evidence shows that the victim died almost instantaneously from a single gunshot wound. *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980); *Peterson*, 225 Va. at 296, 302 S.E.2d at 525. However, proof of infliction of multiple wounds may meet the test for an aggravated battery. *See Boggs v. Commonwealth*, 229 Va. —, —, 331 S.E.2d 407, — (1985) (this day decided); *Edmonds*, 229 Va. at —, 329 S.E.2d at 814. In this case, Watkins exceeded the quality and quantity of force necessary to accomplish Barker's murder. The shots were separated by a lapse of time during which Nash first refused and then obeyed Watkins's order to take the cash drawer to the car. Death was not instantaneous. We hold that this evidence is sufficient to sustain the court's giving of an instruction on vileness based on aggravated battery and the jury's finding under the instruction. *See Turner*, 221 Va. at 518, 527, 273 S.E.2d at 39, 45 (aggravated battery established by evidence that defendant shot store owner in head and, after lapse of time during which two occupants fled and police officer urged defendant not to shoot again, inflicted fatal chest wounds because owner had previously triggered an alarm).

3. Constitutionality of Sentencing Statutes and Form Verdict.

[31] Watkins reiterates arguments previously made in capital cases that Code §§ 19.2-264.2 and -264.4 are unconstitutional. Having repeatedly upheld the constitutionality of these provisions, we adhere to our prior rulings. *See, e.g., LeVasseur*, 225 Va. at 592–94, 304 S.E.2d at 659–60 (statutes facially constitutional and not vague); *Whitley v. Commonwealth*, 223 Va. 66, 77–78, 286 S.E.2d 162, 168–69, *cert. denied*, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982) (death penalty not cruel and unusual punishment and not arbitrarily and capriciously imposed); *James Dyral Briley*, 221 Va. at 577–80, 273 S.E.2d at 65–67 (sentencing statutes not overbroad or vague); *Clark*, 220 Va. at 212, 257 S.E.2d at 791 (death penalty imposed for

appropriate crimes under objective standards); *Smith*, 219 Va. at 476–78, 248 S.E.2d at 148–49 (death penalty not cruel and unusual punishment, jury not vested with standardless discretion, and statutes not void for vagueness).

[32] Watkins also contends that the statutory verdict form is unconstitutional because it places undue emphasis on the aggravating circumstances of future dangerousness and vileness without similarly emphasizing the jury's duty to consider mitigating factors. He also challenges the form verdict because it fails to state the standard of proof for mitigation. States are not constitutionally required "to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances." *Zant*, 462 U.S. at 890, 103 S.Ct. at 2750. The jury is instructed to consider mitigating circumstances, and the form verdict reflects that a jury may sentence a defendant to death only after "having considered the evidence in mitigation of the offense." Code § 19.2-264.4. These safeguards sufficiently satisfy the constitutional requirement that the jury's discretion be "guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." *Proffitt v. Florida*, 428 U.S. 242, 258, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913 (1976).

Listing of aggravating factors in the form verdict without a comparable listing of mitigating factors benefits rather than prejudices the accused. *Clark*, 220 Va. at 212, 257 S.E.2d at 791. Aggravating factors are expressly limited to those specified by statute, while any circumstances in mitigation may be considered. *Id.; see Smith*, 219 Va. at 479, 248 S.E.2d at 149. Hence, the form verdict, which follows the language of the statute, is constitutional.

4. Propriety of Trial Court's Sentence.

The trial court received a post-sentence report as mandated by Code § 19.2-264.5. After conducting a sentencing hearing, at which Watkins offered no additional evidence, the court imposed the death sentence in accordance with the jury's verdict. Watkins argues that his age, 22 years, and his lack of a "significant" prior criminal record required the court to impose a life sentence. We do not agree. Under § 19.2-264.5, the court may set aside the death sentence "upon good cause shown," and the trial court could reasonably conclude from the evidence that good cause had not been shown.

[33] Watkins's age did not *per se* preclude imposition of the death penalty; it was merely a factor to be considered by the jury. *Peterson*, 225 Va. at 300, 302 S.E.2d at 527. Watkins's criminal history, as revealed by the post-sentence report, included, in addition to the assault and possession convictions in evidence at the sentencing phase, one larceny and two shoplifting convictions and a charge of robbery which was dismissed.

[34] Watkins contends on brief that the sentence of death was racially motivated because he is black but the victim and all the jurors were white. A black defendant is not constitutionally entitled to a jury containing members of his own race. *Swain v. Alabama*, 380 U.S. 202, 203, 85 S.Ct. 824, 826, 13 L.Ed.2d 759 (1965); *Brown v. Commonwealth*, 212 Va. 515, 516, 184 S.E.2d 786, 787 (1971), *vacated in part*, 408 U.S. 940, 92 S.Ct. 2877, 33 L.Ed.2d 763 (1972); *see Turner*, 221 Va. at 523, 273 S.E.2d at 42. In order to establish a violation of the Equal Protection Clause, he must demonstrate purposeful or deliberate exclusion of blacks from jury service on the basis of race. Such discrimination "may not be assumed or merely asserted" but must be proven. *Swain*, 380 U.S. at 203–09, 85 S.Ct. at 826–30.

[35] Watkins has presented no evidence that the jury selection procedures in this case departed from the random selection procedures mandated by statute. *See* Code §§ 19.2-260, 8.01-343 to -363. He merely relies on his allegation that the jury was entirely white in composition. His bare

assertion of racial motivation is insufficient to establish systematic exclusion of blacks from membership on juries. He did not challenge the racial composition of the jury at trial, and nothing in the record suggests that his sentence resulted from racial prejudice.

Watkins also argues that the closing argument of the Commonwealth's attorney was improper because it appealed to the jury's passions. This objection was not raised at trial, and we will not notice it for the first time on appeal. Rule 5:21.

Before sentencing Watkins to death, the judge said, "I have reflected upon the evidence which was presented .... After considering all these matters, the Court is of the opinion that the verdict of the jury is both appropriate and just ...." We hold that the court did not abuse its discretion in imposing the death sentence.

B. Buchanan Murder.

1. Sufficiency of Evidence of Vileness

Watkins challenges the sufficiency of the evidence to support an instruction and a jury finding on the existence of vileness. The evidence established that Watkins fired four shots at Buchanan, resulting in wounds to the head, chest, and back. He fired two shots, after which Buchanan fell backward. Watkins then went around the counter, removed the cash drawer, disappeared from sight behind the counter, and fired two additional shots. He returned to the car with the cash drawer and Buchanan's wallet. Medical evidence established that the two chest injuries caused Buchanan's death and that either of these wounds independently would have been fatal.

As in the Barker killing, Watkins's conduct exceeded that necessary to accomplish the murder. Again, he allowed an appreciable lapse of time between shots, during which he removed the drawer and wallet. Again, the victim's death was not shown to be instantaneous. As in the Barker case, the court instructed the jury that it could find vileness based on conduct which involved an aggravated battery. For reasons stated in the appeal of the Barker murder conviction, we hold the evidence sufficient to support the court's instruction on vileness and the jury's verdict.

2. Constitutionality of Sentencing Statutes and Form Verdict.

Watkins restates the arguments raised in the Barker appeal that Code §§ 19.2-264.2 and -264.4 and the form verdict provided in § 19.2-264.4 are unconstitutional. For reasons stated in that appeal, we affirm the constitutionality of these statutory provisions.

3. Propriety of Trial Court's Sentence.

[36] Watkins contends, as he did in the Barker appeal, that the trial court disregarded the evidence of mitigating factors and imposed the death sentence under the influence of passion, prejudice, or other arbitrary factors. He specifically notes, in addition to his age and criminal record, his limited education, low average intelligence, and history of episodic substance abuse. Each of these factors was shown by the evidence during the sentencing phase or was reflected by the post-sentence report. Following a sentencing hearing, at which Watkins offered no additional evidence, the court imposed the death sentence in accordance with the jury's verdict, noting Watkins's earlier conviction for capital murder. There is no evidence that the court refused to consider the mitigating circumstances, and we hold that the court did not abuse its discretion in imposing the death sentence.

Watkins also reiterates his charge that the jury sentenced him to death as a result of racial prejudice and that the Commonwealth's attorney used improper argument. For reasons stated in the Barker appeal we reject these contentions.

V. Sentence Review—Both Cases.

Pursuant to Code § 17-110.1, we are required to consider and determine whether the death sentences in these cases were imposed under the influence of passion, prejudice, or other arbitrary factors. We have rejected in each appeal Watkins's contentions that there were failures to consider or mitigating factors, racial bias, and improper prosecutorial argument. A thorough review of the record in each case reveals nothing to suggest that either death sentence was imposed under the influence of passion, prejudice, or other arbitrary factors.

[37] We are also required to determine whether the death sentences in these cases are excessive or disproportionate to the sentences imposed in similar cases. Comparing the cases with other capital murder cases reviewed by this Court, we have given particular emphasis to cases in which the death sentence was based on both the defendant's future dangerousness and the vileness of the crime.[2] We have also considered the records of all capital cases reviewed by this Court under the present statutes in which life sentences were imposed. It is clear from this review that the sentences of death for the Barker and Buchanan murders are not excessive or disproportionate to sentences generally imposed for similar crimes throughout the Commonwealth.

Of particular interest in this comparison is *Turner*, in which we upheld a death sentence based on both the future dangerousness of the defendant and the vileness of the crime. 221 Va. at 530–31, 273 S.E.2d at 47. The facts in *Turner* are substantially similar to those in the Barker and Buchanan murders for purposes of this review. We hold that the sentences imposed in these two cases are not excessive or disproportionate when compared with *Turner* and other cases. Moreover, the sentences are not excessive or disproportionate when compared with each other. In these cases, which are factually indistinguishable, two distinct juries reviewed the evidence and reached the same result, finding that the aggravating circumstances of future dangerousness and vileness warranted imposition of the death penalty.

Finding no reversible error in the trial of these cases and determining that the death sentences are properly imposed, we will affirm the judgments of the trial court in both cases.

Record No. 841551—Affirmed.

Record No. 841913—Affirmed.

2. Cases based on both predicates are compiled in *Tuggle*, 228 Va. at 517, 323 S.E.2d at 554. Cases relying on both future dangerousness and vileness to support the death penalty, not included in that list, are *Tuggle v. Commonwealth*, 228 Va. 493, 323 S.E.2d 539 (1984), *vacated and remanded*, 471 U.S. —, 105 S.Ct. 2315, — L.Ed.2d — (1985), *Edmonds v. Commonwealth*, 229 Va. —, 329 S.E.2d 807 (1985), and *Poyner v. Commonwealth*, 229 Va. —, 329 S.E.2d 815 (1985).

Cases in which vileness alone formed the basis for imposition of the death penalty are collected in *Jones*, 228 Va. at 450–51 n. 3, 323 S.E.2d at 567 n. 3. Subsequent cases relying only on vileness are *Jones v. Commonwealth*, 228 Va. 427, 323 S.E.2d 554 (1984), *Washington v. Commonwealth*, 228 Va. 535, 323 S.E.2d 577 (1984), *cert. denied*, 471 U.S. —, 105 S.Ct. 2347, — L.Ed.2d — (1985), and *Boggs v. Commonwealth*, 229 Va. —, 331 S.E.2d 407 (1985) (this day decided).

Dangerousness was the basis for the death sentence in the following cases: *Evans v. Commonwealth*, 228 Va. 468, 323 S.E.2d 114 (1984) (affirming imposition of death penalty upon resentencing after prior sentence, which had been upheld in 222 Va. 786, 284 S.E.2d 816 (1981), *cert. denied*, 455 U.S. 1038, 102 S.Ct. 1741, 72 L.Ed.2d 155 (1982), was vacated by trial court); *Peterson v. Commonwealth*, 225 Va. 289, 302 S.E.2d 520, *cert. denied*, 464 U.S. 865, 104 S.Ct. 202, 78 L.Ed.2d 176 (1983); *Bassett v. Commonwealth*, 222 Va. 844, 284 S.E.2d 844 (1981), *cert. denied*, 456 U.S. 938, 102 S.Ct. 1996, 72 L.Ed.2d 458 (1982); *Giarratano v. Commonwealth*, 220 Va. 1064, 266 S.E.2d 94 (1980).

E. Blair BROWN, Executor, etc.

v.

E.N. KOULIZAKIS, et al.

Record No. 820473.

Supreme Court of Virginia.

June 14, 1985.

Deceased patient's executor filed wrongful death action against orthopedic

EDITOR'S NOTE

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IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
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October Term, 1985

JOHNNY WATKINS, JR.,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should consider Petitioner's Edwards v. Arizona, claim when it was not raised in the Supreme Court of Virginia.

2. Whether Petitioner's constitutional rights have been violated by the introduction at his sentencing for capital murder of evidence of a crime for which Petitioner was subsequently convicted.

3. Whether the State was required to provide Petitioner a private investigator absent any showing of necessity.

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No. 85-6324

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JOHNNY WATKINS, JR.,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Barker Case

Johnny Watkins, Jr., was indicted for the capital murder of Betty Jean Barker, in the commission of robbery, the robbery and use of a firearm in the commission of a felony. The trial was conducted before a jury in the Circuit Court of the City of Danville. Watkins was convicted on all counts, and the jury fixed his sentence at life for the robbery, and two (2) years for the use of a firearm.

Pursuant to the bifurcated procedure for capital cases, § 19.2-264.4 of the Code of Virginia, a sentencing proceeding was conducted at which time the Commonwealth introduced evidence in aggravation and Watkins introduced evidence in mitigation. After deliberation, the jury fixed Watkins' sentence at death for the capital murder. A post sentencing hearing was conducted by the Court pursuant to § 19.2-264.5 at which time the Court affirmed the sentence of death. The trial court entered judgment on July 13, 1984.

The Buchanan Case

In a subsequent trial, another jury found Watkins guilty of the capital murder of Carl Douglas Buchanan on November 22, 1983, in the commission of robbery while armed with a deadly weapon, the robbery itself, and use of a firearm in the commission of a felony. Pursuant to the bifurcated procedure of § 19.2-264.4, the jury fixed his punishment for capital murder at death. After consideration of the post sentence report, the trial court affirmed the sentence of death.

The Supreme Court consolidated these two cases, granted Watkins an automatic appeal, and affirmed his convictions and sentences in a written opinion on June 14, 1985. Watkins v. Commonwealth, 229 Va. 469, 331 S.E.2d 422 (1985).

STATEMENT OF FACTS

The Barker Case[1]

On Sunday, November 13, 1983, Betty Jean Barker went to work at Kwik Shop, arriving a little after 11:00 p.m. She was filling in for a fellow employee who had been injured in an accident.

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[1]References are to the Joint Appendix filed in the Supreme Court of Virginia (A. _____).

(A. Vol. I, 442,463). Ellen Boaz, the employee whom Betty Jean relieved, called Betty Jean around 2:00 a.m. on November 14, and talked to her for 15-20 minutes. Algie Pillow, a regular customer, went by the Kwik Shop to purchase some gas. He arrived at 2:40 a.m. and purchased the gas from Betty Jean. No one else was present when he left at 2:45 a.m. (A. Vol. I, p. 442-47). At 3:15 a.m., William Arnold and His girl friend entered the Kwik Shop but were unable to find anyone to serve them. A man who was in the store indicated that he, too, had been unable to find any employee, but had noticed the cash drawer was open. (A. Vol. I, p. 451). Arnold then looked behind the counter and found Betty Jean Barker on the floor. He checked her but was unable to find any pulse. Arnold then called the police. (A. Vol. I, p. 452).

The Life Saving Crew arrived at 3:28 a.m. and likewise could not find any pulse. Betty Jean Barker's body, however, was still warm. (A. Vol. I, p. 471-73).

An autopsy revealed three gunshot wounds in the body of Betty Jean Barker. One in the right cheek, one in the upper right chest, and one in the upper left chest. The wound in the upper right chest perforated the aorta, and was the fatal wound. (A. Vol. II, p. 585-94). A fourth bullet was found entangled in the sweater worn by the victim. (A. Vol. II, p. 584). These four bullets were marked and submitted to William Conrad, a firearms examiner. (A. Vol. II, p. 585).

During the early evening of November 13, 1983, the defendant and others gathered at the home of Kenny Fitzgerald to play cards. (A. Vol. I, p. 481; Vol. II, p. 490, 650-51). During the course of the evening the defendant lost money in the card game, and borrowed $10.00 from Fitzgerald before leaving. (A. Vol. I, p. 485, Vol. II, p. 494).

Quentin Nash, testifying on behalf of the Commonwealth, admitted that he had been found guilty of these offenses and was awaiting sentencing. His testimony revealed that he and the defendant left Fitzgerald's around 1:30 a.m. on November 14, in

order for the defendant to give Nash a ride home. The defendant and Nash changed their minds and decided to go to a store. While driving around the defendant said he was tired of being broke and was going to rob the Kwik Store. (A. Vol. II, p. 498). They arrived at the Kwik Store around 2:40 a.m. and Nash agreed to act as a lookout. Some people were at the store so after purchasing some gas, they drove across the street to wait. (A. Vol. II, p. 499-501). When the people left the store, the defendant and Nash returned about 3:00 a.m. The defendant entered the store and Nash waited in the car. Having second thoughts about the robbery, Nash entered the store and began to shake his head at the defendant in an effort to prevent the robbery. (A. Vol. II, p. 504). The defendant had requested a pack of cigarettes, and when Betty Jean Barker opened the cash register, the defendant shot her twice causing her to fall. The defendant told Nash to get the cash drawer. Nash grabbed the cash drawer and ran out the door. When Nash ran out the door the defendant was leaning over the counter with the gun. Only two shots had been fired before Nash left the store. (A. Vol. II, p. 505-507).

On November 22, 1983, the police were investigating a murder-robbery which had occurred at Fast-Fare that day. The victim, Carl Buchanan, had been shot four times by a .22 caliber weapon. (A: Vol. I, p. 14-18, 30).

In connection with this investigation the police executed a search warrant for the premises occupied by the defendant's brother, Darnell. The police found a black jacket which had attached to it a hospital identification card for the defendant. In the pocket of this jacket the police found a .22 caliber pistol and eight empty shells. (A. Vol. I, p. 14, 17, 21, 30, 38). The defendant, who had entered the premises after the search, was shown the black jacket and another jacket and asked to whom they belonged. The defendant said the black jacket belonged to him. (A. Vol. I, p. 46).

The bullets taken from the body of Betty Jean Barker, as well as those taken from the body of Carl Buchanan, were compared

ballistically with the weapon found in the defendant's coat. A ballistics expert found that the bullets taken from both bodies had been fired from the .22 caliber pistol found in the defendant's coat. (A. Vol. II, p. 611, 804).

The Buchanan Case[2]

On November 22, 1983, Carl Buchanan was working at the Fast-Fare, a convenience store located on West Main Street in the City of Danville, Virginia. Buchanan was on duty during the third shift which placed him at the store in the very early morning hours. (A. Vol. I, pp. 375-378). He was known to be alive up until about 1:30 a.m. (A. Vol. I, pp. 376, 381)). At approximately 1:45 to 1:50 a.m., Terry Levi Cox arrived at the store. When he entered he saw no one. After a few minutes had passed and no clerk had appeared, Cox noticed the cash register was open and the money drawer was missing. (A. Vol. I, pp. 382-383). Suspecting a robbery, he looked behind the counter and found the body of Carl Buchanan. (A. Vol. I, p. 384, Vol. II, p. 405).

Cox called the police from a pay phone on the outside of the building. The police responded immediately and were on the scene by 1:55 a.m. (A. Vol. I, pp. 385-386). The investigation began with photographing the scene and searching for the victim's wallet (for identification purposes). No wallet was found. (A. Vol. I, p. 388). Other Fast-Fare employees were contacted and it was discovered that there was a two-dollar bill missing, the serial number of which had been recorded. (A. Vol. I, pp. 389-390). The Total amount of money missing from the cash register was $34.73. (A. Vol. II, p. 403).

Local merchants were advised on that same day to be on the look-out for the missing two-dollar bill. (A. Vol. II, p. 429).

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[2]References are to the Joint Appendix filed in the Supreme Court of Virginia. (A. ____).

As a result, the police were notified when a two-dollar bill bearing the reported serial number was tendered at Abe Koplen's clothing store that afternoon. (A. Vol. II, pp. 418-420). Darnell Watkins was subsequently identified as the presenter of that bill. (A. Vol. II, pp. 417, 421, 426-428, 430). Thereafter, a search warrant was obtained for the residence of Darnell Watkins to attempt to recover evidence relative to the robbery and killing of Carl Buchanan. (A. Vol. II, pp. 498-499).

The search occurred on the night of November 22, 1983. Found and seized during the course of that search were the following items: a single orange-brown leather left-hand glove; a Remington .22 caliber bullet box containing two live rounds; a jacket with a reindeer design containing credit cards, a driver's license and other items belonging to Carl Buchanan; and a dark blue or black jacket containing an identification badge of Johnny Watkins, a surgical glove, a knotted stocking, eight empty bullet cartridges, and a pistol loaded with six live rounds of ammunition. (A. Vol. II, pp. 503-504, 508-509, 512, 514, 518-526). These items were found in a bedroom shared by Darnell Watkins and his brother, the Petitioner. (A. Vol. II, pp. 434, 456, 505).

The Petitioner was taken to police headquarters and later advised he was being charged. The Petitioner asked why and was told that his brother was talking and the marked two-dollar bill had been traced to Darnell. (A. Vol. II, pp. 496-497). Subsequently, another two-dollar bill that the Petitioner had been concealing was recovered from him. It was wadded and wet "like he'd been chewing on it." (A. Vol. II, p. 515).

At trial, Darnell Watkins was called as a witness for the Commonwealth. He admitted that he had been involved with his brother in the commission of the crimes. His testimony revealed that sometime after midnight on November 22, 1983, he and the Petitioner left their home to go to a store and buy cigarettes. (A. Vol. II, pp. 436-437). They rode together with the Petitioner driving. During the trip, the Petitioner said, "I

might rob some place." (A. Vol. II, p. 439). They drove past the Fast-Fare store once and then turned around and went back. Having then determined that the clerk was alone, the Petitioner entered the store while Darnell waited in the car which was parked directly in front of the door. (A. Vol. II, pp. 439-442). From that vantage point, Darnell saw the Petitioner point a gun at the clerk and then observed the score clerk fall backwards. The Petitioner went to the other side of the counter and took the cash drawer from the cash register. Darnell then heard two shots and saw the Petitioner bend down behind the counter. (A. Vol. II, pp. 442-445). The Petitioner returned to the car, carrying the cash drawer and a wallet. As they drove away, Darnell asked the Petitioner if he had shot "the guy." Finally the Petitioner replied that he had shot the man three or four times in the head and chest. (A. Vol. II, pp. 446-448).

Subsequently, the cash drawer and wallet were discarded in a storm sewer after their contents had been removed. (A. Vol. II, pp. 469-451). At Darnell's direction, the police later recovered the cash drawer, but the wallet had apparently washed away. (A. Vol. II, pp. 500-501). On the night of the killing, the Petitioner was wearing the jacket with the reindeer design and a glove on one hand. (A. Vol. II, p. 452).

Additional testimony presented by Darnell Watkins, and confirmed by the brothers' aunt, Thelma Stuart, revealed that the Petitioner attempted to have Darnell accept responsibility for the robbery and he (the Petitioner) would claim the murder. The Petitioner wanted this done so "he wouldn't get the chair." (A. Vol. II, pp. 453-464, 485). Thelma Stuart also indicated that the Petitioner had admitted the killing to her. (A. Vol. II, p. 484).

An autopsy was performed on the body of Carl Buchanan by Dr. David W. Oxley of the Medical Examiner's Office. Four gunshot wounds were discovered. One wound was located in the area of the left temple, forward of the left ear. No residue was found on the skin around that wound. The bullet passed towards the rear

of the victim's head into the heavy bone just behind the ear. (A. Vol. II, p. 534). A second wound was found on the left upper chest. Gun powder residue was noted on the deceased's clothing around this wound. The bullet traveled towards the back, downward and to the right. It pierced the left lung and the aorta. A third wound was located on the left mid-chest. Gun powder residue was in the area of this wound also. This bullet traveled in roughly the same direction as the other shot to the chest. It punctured both lungs. The fourth wound was on the right lower back and no gunshot residue was in the area. The bullet passed upwards and to the left. (A. Vol. II, pp. 535-536). The wounds which showed residue were inflicted from a range of six to twenty-four inches. Those that showed no residue were inflicted from a range of more than twenty-four inches. (A. Vol. II, pp. 536-537). Either of the two chest wounds would have been fatal. (A. Vol. II, 542-543).

The bullets which were removed from the body and the gun found in the Petitioner's jacket were analyzed by William E. Conrad, a firearms expert. He concluded that one of the bullets from the chest had definitely been fired from the Petitioner's gun and the other three bullets exhibited characteristics consistent with having been fired by that weapon. (A. Vol. II, pp. 556, 561-562).

At the sentencing phase of trial, evidence was presented which showed that the Petitioner had committed the Barker capital murder some eight days prior to the instant offense.

ARGUMENT

I.

PETITIONER'S EDWARDS v. ARIZONA, 451 U.S. 477 (1981), CLAIM IS NOT PROPERLY BEFORE THIS COURT.

In his petition for certiorari, Petitioner asserts that statements he gave to police were inadmissible and should not have been used against him.[3] Petitioner premises his argument

upon an assertion that he was interrogated after he asserted his right to counsel in violation of this Court's decision in Edwards v. Arizona, 451 U.S. 477 (1981).

Prior to his trial Petitioner moved to suppress statements given by him to the police. His motion to suppress was grounded upon an alleged violation of Miranda v. Arizona, 384 U.S. 436 (1966). The Petitioner contested the statements on the ground of voluntariness.

On appeal the Petitioner presented the Supreme Court of Virginia with this argument:

> The Trial Court Erred B Overruling Defendant's Motion to Suppress Certain Incriminating Statements Made To Police Subsequent To His Arrest, In Violation Of The Constitutional Rights Recognized By Miranda v. United States [sic], 384 U.S. 436 (1966).

Petitioner's Brief, p. 20. At no time in his brief did Petitioner ever cite Edwards v. Arizona, or argue that he was entitled to relief upon the theory that he had been improperly interrogated after requesting counsel. See Supplemental Appendix for Petitioner's Argument to the Virginia Supreme Court on this issue. His only reference to the issue of counsel was that the record showed a conflict between the detective and Petitioner over whether Petitioner had invoked his right to have an attorney present during the interrogation.

The Supreme Court of Virginia ruled upon the question Petitioner presented to it and found that Petitioner's statement was voluntarily given. Watkins v. Commonwealth, 229 Va. at 476-478, 331 S.E.2d at 429-430.

It is clear that Petitioner has never presented his Edwards v. Arizona claim to the Supreme Court of Virginia.

It was very early established that this Court would not decide federal constitutional issues raised for the first time on a petition to review state court decisions. Cardinale v.

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[3]The statements about which Petitioner complains were introduced by the Commonwealth only during the penalty phase of Petitioner's trial. Accordingly, the resolution of this issue would have no impact upon the guilt phase of Petitioner's trial.

Louisiana, 394 U.S. 437 (1969). The rationale underlying this Court's policy of refusing to review issues raised for the first time in this Court in that in a federal system it is important that state courts be given the first opportunity to consider the applicability of constitutional challenges, and to assume that this Court would have an adequate record before it prior to rendering decisions of constitutional magnitude. Hill v. California, 401 U.S. 797 (1971).

It is therefore apparent that this Court should not grant the petition for a writ of certiorari based upon Petitioner's Edwards v. Arizona claim. Beck v. Washington, 369 U.S. 541 (1962); Rugendorf v. United States, 376 U.S. 528 (1964).

ARGUMENT

II.

THE ADMISSION DURING THE SENTENCING PHASE OF EVIDENCE OF A CRIME FOR WHICH DEFENDANT HAD NOT BEEN CONVICTED WAS NOT ERROR.

At the time of his trial the Petitioner had been indicted but not tried for the capital murder of Carl Buchanan in the commission of robbery. During the sentencing phase of Petitioner's trial for the capital murder of Betty Jean Barker, the trial court allowed the Commonwealth to introduce evidence relative to the murder and robbery of Carl Buchanan.

The Commonwealth introduced photographs of Fast-Fare Store showing a cash register drawer missing, and the body of Carl Buchanan. (A. Vol. II, p. 781). Evidence was introduced showing that $34.93 was missing from the cash register. (A. Vol. II, p. 793). The medical examiner testified that he had removed four bullets from the body of Carl Buchanan and had turned them over to William Conrad, a firearms examiner. (A. Vol. II, p. 795). The firearms examiner testified that one of the bullets retrieved from the body of Carl Buchanan was fired from the

pistol which had been found in the pocket of the defendant's jacket. (A. Vol. II, p. 804). Lastly, a statement given by the Petitioner on November 28, 1983, in which he admitted shooting Carl Buchanan, was introduced into evidence. (A. Vol. II, p. 809-810).

The Supreme Court of Virginia found that admissible evidence in the sentencing phase is not limited to the defendant's record of convictions, and may include evidence of other crimes for which a defendant has not been convicted. Watkins v. Commonwealth, 229 Va. at 488, 331 S.E.2d at 436.

It was entirely appropriate under the state of the law for the jury to have before it during the sentencing phase "as much information...as possible when it makes the sentencing decision." Gregg v. Georgia, 428 U.S. 153, 204 (1976). To the same effect is Lockett v. Ohio, 438 U.S. 586 (1978).

Evidence of crimes for which the defendant had not been convicted have been admitted in the sentencing phase by other courts. In Cline v. State, 656 S.W.2d 684 (Ark. 1983), the court allowed a witness to testify that the defendant had previously committed another felony by the use or threat of violence. Likewise, in State v. Rault, 445 So.2d 1203 (La. 1984), the court allowed the state to offer testimony linking the defendant with embezzlement and with a possible attempted murder. The Court of Criminal Appeals rejected a defendant's argument that error had been committed when the trial court admitted at the punishment stage evidence of an earlier unadjudicated robbery-murder. Williams v. State, 668 S.W.2d 692 (Tex. Ct. Crim. App. 1983). The court reasoned that such argument was without merit citing Jurek v. Texas, 428 U.S. 262 (1976). See also Milton v. Procunier, 744 F.2d 1091 (5th Cir. 1984), cert. denied, 105 S.Ct. 2050 (1985).

It should be noted that Petitioner was convicted of the capital murder of Carl Buchanan and his conviction has been affirmed by the Supreme Court of Virginia. Watkins v. Commonwealth, 229 Va. at 486, 331 S.E.2d at 435. This fact

disposes of Petitioner's argument that "a jury could rely on evidence of a subsequent crime in imposing a death sentence, and a second jury could acquit the defendant of that very crime later." (Petition, p. 8).

ARGUMENT

III.

THE STATE WAS NOT REQUIRED TO FURNISH PETITIONER WITH A PRIVATE INVESTIGATOR.

The Petitioner filed a written motion requesting that the court provide an investigator to aid in the preparation of his defense. The motion claimed that the right to effective assistance of counsel would be denied if an indigent defendant in these circumstances was denied independent investigatory capabilities. (A. Vol. I, p. 16). A contemporaneous request for appointment of additional counsel was granted, but the court refused to authorize the expenditure of public funds to hire an investigator for the Petitioner. (A. Vol. I, pp. 182-185).

The facts of this case demonstrate no need for an investigator. The prosecution's case was outlined for the defendant prior to trial, including the names of witnesses. (A. Vol. I, pp. 185-186). As noted by the trial judge, by the time the proceedings reached the stage of pre-trial motions, the Commonwealth's investigation was essentially complete and the facts of the case were "straightforward." (A. Vol. I, pp. 184-185). The Petitioner had admitted shooting Carl Buchanan and participating in the theft of the cash drawer. (A. Vol. II, pp. 810-811). There was no need to search for additional witnesses or attempt to find previously undiscovered evidence. Indeed, Petitioner's motion and argument made no reference to a particularized need for the investigator. No specific task was alleged to be needed which required the assistance of an investigator. Under the facts of this case Petitioner made no showing whatsoever that an investigator was necessary. See Caldwell v. Mississippi, 105 S.Ct. 2633, 2637 n. 1 (1985).

CONCLUSION

For the foregoing reasons, the Respondent respectfully submits that the petition for certiorari should be denied.

Respectfully submitted,

MARY SUE TERRY
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James E. Kulp

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Senior Assistant Attorney General

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CERTIFICATE OF SERVICE

I, James E. Kulp, Senior Assistant Attorney General of Virginia, and a member of the Bar of this Court, do certify that on this 10th day of March, 1986, one copy of this Brief In Opposition was mailed to:

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counsel for Petitioner. All parties required to be served have been served.

James E. Kulp

James E. Kulp
Senior Assistant Attorney General

SUPPLEMENTAL APPENDIX

I

THE TRIAL COURT ERRED BY OVERRULING DEFENDANT'S MOTION TO SUPPRESS CERTAIN INCRIMINATING STATEMETNS MADE TO POLICE SUBSEQUENT TO HIS ARREST, IN VIOLATION OF THE CONSTITUTIONAL RIGHTS RECOGNIZED BY MIRANDA V. UNITED STATES, 384 U.S. 436 (1966) et. seq.

Subsequent to being taken into custody, defendant executed three (3) separate advice of rights forms provided by various members of the Danville Police Department and gave, in essence, two statements relating to the murder/ robbery of Carl Buchannan on November 22, 1983, at the West Main Fast Fare of Danville. (Refer to Commonwealth Exhibit #'s 35, 36, 37, 38 and 39, App. Vol. #2, pages 897 through 903, and Commonwealth Exhibit #Q App. Vol. #2, pages 950 through 952.) Defendant filed a pre-trial motion to suppress certain incriminating statements made to police subsequent to his arrest and a suppression hearing was held on March 8, 1984 in Danville Circuit Court. At the conclusion of the suppression hearing Judge Ingram ruled that the statements were admissible and the motion to suppress was overruled. (App. Vol. I, page 153).

Defendant concedes that a confession is evidence and that under the mandate of the Fifth Amendment, its admissibility depends upon its voluntariness, a factual question which must be resolved by the trier of fact. Witt v. Commonwealth, 215 Va. 670, 674, 212 S.E. 2d 293, 297 (1975). The measure of the burden of proof with respect to factual questions underlying the admissibility of evidence is proof by a pre-ponderance of evidence and that same measure applies the burden of proving voluntariness of the confession. Id. at page 674. In determining whether the Commonwealth has met its burden, the trial court, acting as a fact-finder, must evaluate the credibility of the witnesses, resolve conflicts of testimony and weigh the evidence as a whole. Defendant argues in the case at bar that this standard was not followed and that

the trial court erred by admitting a statement made by the defendant to Detective M. O. Dalton on November 28, 1983, into evidence at the sentencing phase of the aforesaid trial.

According to the evidence introduced relating to the statement of November 28, 1983, only two persons, Detective M. O. Dalton of the Danville Police Department and the defendant were present when he made his statement at the Pittsylvania County Jail on the morning of November 28, 1983 at approximately 8:12 a.m. Dalton and Watkins contradicted one another as to whether Watkins invoked his right to have an attorney present for the interrogation. Dalton repeatedly asserted that the defendant never requested the presence of a lawyer (Dalton, App. Vol. #I, pp. 142-143). On the other hand, Watkins, at the suppression hearing, testified that he told Dalton that "...I won't gonna answer no questions". (Watkins, App. Vol.#I, page 130). Watkins further testified that the waiver made reference to the fact that he could stop at any time he wanted and that Dalton persisted in asking questions in spite of his invocation of that privlege. (Watkins, App. Vol. I, page 130-131). Defendant concedes that a statement made knowingly, voluntarily and intelligently upon advise of ones miranda rights is admissible in evidence, but argues in this case that the detective expressly ignored his request for counsel shortly after defendant signed a waiver of his rights. Defendant testified that he gave the statement only "after I seen he was gonna keep nagging me". (Watkins App. Vol. I, page 137). It is defendant's contention that his Fifth Amendment right against self-incrimination simply was ignored and the office proceeded to obtain the incriminating statement which he sought. Defendant argues that the factual findings relating to voluntariness of the confession in issue here plainly was wrong and thus the trial court erred in admitting this statement into evidence.

(4)

SUPREME COURT OF THE UNITED STATES

JOHNNY WATKINS, JR. *v.* VIRGINIA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

No. 85–6324. Decided March 31, 1986

The petition for a writ of certiorari is denied.

Opinion of JUSTICE STEVENS respecting the denial of the petition for certiorari.

As JUSTICE MARSHALL explains in his dissenting opinion, the violation of petitioner's Fifth Amendment right to counsel requires that the sentence of death for the shooting of Betty Jean Barker be set aside. However, in view of the fact that, as petitioner has presented the issue, this error would not appear to have affected the validity of the conviction or the death sentence for the murder of Carl Douglas Buchanan, I agree with the Court's decision to deny certiorari and allow the error to be corrected in collateral proceedings.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

In the landmark case of *Miranda* v. *Arizona*, 384 U. S. 436 (1966), this Court held that before police institute custodial interrogation of an individual, they must inform him of his right to consult with counsel. *Miranda* further required that the police respect the individual's decision to exercise that right. We stated, in clear and mandatory language:

> "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent." *Id.*, at 474.

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We reaffirmed that rule in *Fare* v. *Michael C.*, 442 U. S. 707, 719 (1979) ("the Court fashioned in *Miranda* the rigid rule that an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease"); see also *Rhode Island* v. *Innis*, 446 U. S. 291, 298 (1980); *Michigan* v. *Mosley*, 423 U. S. 96, 104, n. 10 (1975); *id.*, at 109–111 (WHITE, J., concurring in the result). We refined the rule in *Edwards* v. *Arizona*, 451 U. S. 477, 485 (1981), explaining that the right to counsel, once asserted, cannot be waived "unless the accused himself initiates further communication, exchanges, or conversations with the police." We emphasized: "[I]t is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel."

In this case, the Court acquiesces in a blatant denial of that Fifth Amendment right by the police and the courts of the State of Virginia. Unwilling to ignore that violation, I dissent from the denial of certiorari.

I

Petitioner Johnny Watkins, Jr. was charged with the murder of Betty Jean Barker. The State announced its intention to introduce at the penalty phase of that trial a statement made by Watkins in connection with an unrelated murder. During the pretrial suppression hearing, the following facts emerged.

Watkins was arrested in the evening of November 22, 1983, as a suspect in the murder of Carl Douglas Buchanan. He was questioned about 11 p. m. and signed a waiver-of-rights form, but then told the interrogating officer that he wanted to see a lawyer. Interrogation ceased temporarily.

About two hours later, Watkins was informed that he was being charged with the murder of Buchanan. He asked why he was being charged, and was given a second waiver-of-rights form to execute. The police then told Watkins that his brother Darnell had implicated him in the murder, played for him a portion of Darnell's recorded statement, and took him to see Darnell. Watkins refused to talk to police about the shooting.

The police did not supply Watkins with a lawyer. They instead transferred him to the county jail, held him there until November 28, and then reinterrogated him. Testimony was conflicting as to what happened at the November 28 meeting. The parties agreed that a police officer went to the jail to interrogate Watkins, and had him sign a waiver-of-rights form. Watkins testified that he again asked for a lawyer but that the officer ignored his request, and that the officer "nagg[ed]" him until he admitted to the shooting of Buchanan. The officer testified that Watkins never stated on November 28 that he wanted to stop the questioning or consult with a lawyer, and that he gave his statement without apparent hesitation. The Barker trial court apparently credited the officer's testimony. There was no dispute, however, that Watkins had requested a lawyer five days earlier, had not received one, had not himself reinitiated questioning, and had been questioned again nonetheless.

Watkins' statement implicating himself in the Buchanan killing, along with extensive other evidence of that crime, was admitted over objection in the penalty phase of Watkins' trial for the shooting of Barker. The jury sentenced Watkins to death. Some months later, Watkins was convicted of the murder of Buchanan, and was given a second death sentence.

The facts of this case constitute a plain violation of petitioner's Fifth Amendment right to counsel. Our law sets out a bright-line rule that all questioning must cease after an accused requests counsel, so that repeated police questioning does not "wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Smith* v. *Illinois*, —— U. S. ——, —— (1984) *(per curiam)*. The accused may not be found to have waived

that right, once he asserts it, unless he himself reinitiates questioning. *Ibid.*

In this case, Watkins made an undisputed and unequivocal request for counsel on November 22, and refused to talk to the authorities in counsel's absence. The response of the police was to hold Watkins without a lawyer for five days and then to interrogate him again. Even if the trial court credited the police officer with respect to the events of November 28, that interrogation was impermissible under *Miranda* and its progeny, and any statement so elicited should not have been admitted in the penalty phase of a capital proceeding. See *Estelle* v. *Smith*, 451 U. S. 454, 462–463 (1981); see also *Del Vecchio* v. *Illinois*, —— U. S. —— (1985) (MARSHALL, J., dissenting from denial of certiorari).

II

Respondent State of Virginia contends that petitioner did not adequately present his Fifth Amendment claim to the Supreme Court of Virginia. It focuses on the fact that Watkins did not include the magic words "*Edwards* v. *Arizona*" in his brief to that court. This contention has no merit. *Edwards* merely set out an elaboration of the basic rule of *Miranda*, and Watkins cited expressly to *Miranda* below. He argued to the trial court that the statement had been taken in violation of his Fifth Amendment right to counsel. He argued to the appellate court that his statement had been taken in violation of his Fifth Amendment rights and was involuntary, focusing on his claim that police had ignored an express request for counsel on November 28. While Watkins did not present his argument below as proficiently as he now does in his petition for certiorari, he unmistakably raised below and reasserts here a claim that the November 28 statement was taken in violation of his Fifth Amendment right to counsel. The denial of his November 22 request for counsel is part and parcel of that claim. See *Eddings* v. *Oklahoma*, 455 U. S. 104, 113–114, n. 9 (1982).

III

The Court today allows Watkins' death sentence to stand notwithstanding the illegality of the evidence introduced before the jury in its sentencing deliberations. The denial of his petition adds to a long line of cases in which the Court has declined to review capital sentences marred by the sort of violation described here. *E. g.*, *Henderson* v. *Florida*, —— U. S. —— (1985) (MARSHALL, J., dissenting from denial of certiorari); *James* v. *Arizona*, —— U. S. —— (1984) (BRENNAN, J., dissenting from denial of certiorari); *Johnson* v. *Virginia*, 454 U. S. 920 (1981) (MARSHALL, J., dissenting from denial of certiorari). I dissent.